TEXAS LAWYER

www.texaslawyer.com

MAY 17, 2010 VOL. 26 • NO. 7 An ALM Publication

[LEGAL ethics]

PROPOSALS WOULD AFFECT CONFLICT-OF-INTEREST RULES

by BRUCE A. CAMPBELL

The proposed amendments to the Texas Disciplinary Rules of Professional Conduct could change the ethics rules for Texas lawyers. The State Bar of Texas published a second set of proposed rules on its website in April. Although each of the proposed amendments is important, the conflict-of-interest rules are particularly worthy of discussion; space constraints permits discussion of only a few.

Five of the existing disciplinary rules primarily govern conflicts of interest. Rule 1.06 governs current-client conflicts, Rule 1.09 addresses former-client conflicts, Rule 1.08 concerns prohibited transactions, and Rule 1.07 is sometimes known as the lawyer-intermediary rule. Lawyers who are, or were, employed in government service also must consider Rule 1.10.

The proposed amendments substantially rewrite Rule 1.07, the lawyer-intermediary rule. They clarify that it applies more broadly than many lawyers previously had thought. Instead of being relevant only to situations in which a lawyer acts as an intermediary between clients, such as representing two entrepreneurs working out the financial reorganization of a business, the amendments make clear that the rule applies to all representations in which the lawyer or affiliated lawyers represent multiple clients on the same matter.

Rule 1.07(b) prohibits a lawyer from representing two or more clients in a matter unless nine requirements are met, the last four of which must be documented in writing. The representation must not violate Rule 1.06, the current-client conflict rule. The clients must be able to agree among themselves to a resolution of any material issue concerning the matter. Each client must be capable of understanding what is in its best interests and be able to make informed decisions. The lawyer must be able to deal impartially with each of the clients. The representation must be unlikely to result in material prejudice to the interests of any of the clients. The lawyer must act impartially as to all clients. The lawyer cannot serve as an advocate for one client in the matter

against any of the other clients. Each client must be willing to make independent decisions without the lawyer's advice to resolve issues concerning the matter. Events may occur that could require the lawyer to withdraw before the matter is completed.

Although case law has grafted many of these requirements onto Rule 1.07, the amendments are significant because violating any of these requirements could subject a lawyer to discipline for violating the rule. In the past, that was less than clear.

Practically speaking, the Rule 1.07 amendments could have significant import for lawyers representing multiple parties in litigation. It is not uncommon for lawyers to defend multiple defendants in a single suit. Many times, the defendants' interests completely align in warding off the plaintiff's claims.

PRACTICALLY SPEAKING, THE RULE 1.07 AMENDMENTS COULD HAVE SIGNIFICANT IMPORT FOR LAWYERS REPRESENTING MULTIPLE PARTIES IN LITIGATION.

Nevertheless, issues such as when, how and with whom to settle can crop up and create divergent interests despite the previous harmony.

The amendments to Rule 1.07 will not apply just to litigators but to all lawyers representing multiple clients in Texas. Consider a holding company's general counsel who undertakes to represent a wholly owned subsidiary. Under the proposed amendments, he must comply with all nine requirements of Rule 1.07 because the transaction with the subsidiary implicates the holding company's interests.

Affiliated Lawyers

Another interesting conflict-of-interest issue the proposed amendments raise relates to Rule 1.06(c) and (e). The rule provides that when a lawyer is prohibited from representing a client, no affiliated lawyer who knows or reasonably should know of the prohibition may represent the client, unless the prohibition is based on the prohibited lawyer's personal interest — basically, that lawyer's individual client experiences — and the affiliated lawyer reasonably believes he will be able to provide competent and diligent representation.

The exemption provided by Rule 1.06 might prove helpful when a lawyer changes firms. For example, an attorney might be able to continue representing a client from his old firm that is potentially adverse to clients of the new firm. Of course, this could only occur so long as the lawyer reasonably believes he can provide competent and diligent representation to the client, the lawyer complies with Rule 1.07, and the client provides informed consent in writing.

This could mean that a lawyer in a multi-lawyer firm could represent a client while a lawyer down the hall could sue that client in another matter, and as long as the lawyers had informed consent, the lawyers could share information about the client with one another. What the rule leaves open is, if the exemption under Rule 1.06 applies, must the firm erect an ethical screen, a concept the Texas Supreme Court steadfastly has rejected, or take any other steps to protect the client and the exemption? The amendments are silent.

The proposed amendments to the Disciplinary Rules likely will affect all lawyers in Texas. Representations of multiple parties will need to conform to the standards of Rule 1.07. Conflicts and their waiver will continue to raise difficult issues. Lawyers will have to try to adjust their conduct to meet the new standards or potentially face disciplinary action. TNL

Bruce A. Campbell is a shareholder in Campbell & Chadwick in Dallas. He defends lawyers in tort and disciplinary actions and regularly is retained as an expert witness to opine on standard-of-care and lawyer-ethics issues.